IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~75-896~~ 75-986

BERNARD J. COLLINS and MARIAN COLLINS,
Petitioners,

vs.

THE RIDGE TOOL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Table of Cases

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STATEMENT OF CASE

The undisputed facts upon which the Court of Appeals based its decision and which are not mentioned in the petition are, in the words of the Court: "* * * it is undisputed that appellee herein had, at the time of the accident, 'owned five Rigid 300's', and prior thereto had accomplished a pipe operation with the Rigid 300 'hundreds of times'. Appellee further testified that he appreciated and was fully aware of the danger of being entangled in the pipe while it was turning in the machine. * * * it is uncontested that appellee was a master plumber for several years prior to the date of the accident. Therefore, he

had many years of training and experience in using and operating the machinery indigenous to his business, and had attained enough expertise, in fact, to have risen to the status of a master plumber. * * * that appellee was a professional in his trade who, because of past experience, had to be fully cognizant of the hazards involved in his work." (A-13). These are the facts, peculiar to this case, which the Court below emphasized, and upon which it found that there was no evidentiary basis to support the jury's verdict. It did *not* weigh conflicting evidence but relied on these *undisputed facts*.

In order to understand the importance which the Court below attached to petitioner Bernard Collins' prior training, knowledge, and use of the Ridgid 300, a fuller description of the machine and the circumstances of the accident are necessary.

The Ridgid 300 is a portable machine used by plumbers for cutting, reaming, and threading pipe. Prior to its development, plumbers performed those operations by securing the pipe in a stationary position and manually rotating a hand tool around the pipe. With the Ridgid 300, the pipe is rotated and the tool is held stationary.

The Ridgid 300 is composed of an electric motor encased in a cast aluminum housing and mounted upon a collapsible tripod. The pipe is placed through a horizontal hole, which extends through the center of the housing and through circular devices at the front and back of the machine. The device at the back of the machine centers the pipe. The device at the front clamps or secures the pipe in place. Two horizontal bars extend forward from either side of the housing. An attachment, which holds the cutting, threading, and reaming tools, is mounted on the horizontal bars. The cutter and the reamer are connected to one side of the attachment in a way which permits their movement from a vertical to a horizontal position. When either tool is not in use, it is held in the vertical position

to the side of the section of pipe being worked on; when it is used, it is brought into contact with the pipe by pulling it down into a horizontal position.

The switch is situated in an indentation on the side of the housing beneath the carriage arm support opposite the side of the carriage on which the cutter and threader are mounted. That position was selected to protect the switch from physical damage, dirt, and moisture, to eliminate the danger of accidentally starting the machine, and to keep it near the operator while he uses the machine.

When the Ridgid 300 is used to cut pipe in accordance with instructions in the Operator's Manual, the pipe is inserted into the unit, the speed chuck and centering devices are tightened, the cutter is applied to the pipe, and its blade is tightened until it contacts the pipe. The power is then turned on. The cutter blade is tightened until the cut is completed.

On November 28, 1967, Collins was using the machine to cut a 12 inch section of pipe. He was wearing a light-weight quilted jacket at the time. He does not recall tightening the centering device and testified that he believes he did not do so. Collins made a measurement on the pipe and turned the machine on before positioning the cutter. When he reached for the cutter, which was in its vertical position, the front of his jacket became entangled in the rotating pipe. He could not reach the power switch and the machine tipped over, broke, dislocated, and injured his left arm before the machine was stopped by one of his employees.

The machine was first marketed in 1958. Between 1958 and the time of the accident, 57,215 machines were sold. Prior to the date of the accident, only one accident had been reported to the respondent. Before the commencement of this suit, no claim for injuries arising out of the use of the Ridgid 300 had ever been made against the respondent.

ARGUMENT

This is a diversity case involving a claim arising solely under the law of Wisconsin. This Court has consistently refused to grant certiorari in negligence cases arising under state law where, as in this case, the sole question is whether the Court of Appeals correctly applied state court appellate standards in reviewing the evidence.

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220 at 227.
>
> "Cases like this, I am firmly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here." Mr. Justice Stewart, concurring, in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 at 111 (1959).

I. There Is No Intra-Circuit Conflict of Decision or Denial of Seventh Amendment Rights.

No intra-circuit conflict,[1] or deprivation of Seventh Amendment rights to a jury trial is created, as asserted by the petitioners, merely because the Court of Appeals, in exercising a meaningful supervision of this jury's verdict, chose to reverse rather than affirm. The Court of Appeals does not have to agree with the District Court's appraisal of the evidence. As this Court said in *Neely v. Eby Construction Co.*, 386 U.S. 317, 322 (1967):

[1] Dissenting opinions and split votes on petitions for *en banc* rehearing in the court below, do not create intra-circuit conflicts, at least of the type reviewed on certiorari.

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n. o. v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n. o. v.* See *Baltimore & Carolina Line, Inc. v. Redman* [295 U.S. 654]. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n. o. v.* on appeal."

In affirming the lower court in *McPhee v. Corinth Machinery Co.* (7th Cir. 1971), reproduced in Petitioners' Appendix E, and *Sievers v. Keebler Company*, 487 F.2d 1404 (7th Cir. 1973), reproduced in Petitioners' Appendix G. the Court of Appeals simply assessed the unique facts of those cases and concluded that there was substantial evidence to support the verdicts. In the instant case, it concluded that there was no evidentiary basis for the finding that Collins' injuries resulted from the manufacturer's negligence. A-13. In so doing, it did not create an intra-circuit conflict by applying different standards of review to the same facts. On the contrary, it applied the same standards to different facts. The law does not require that plaintiffs always win.

II. There Is No Conflict With Applicable State Appellate Standards.

It is undisputed that in this diversity case, Wisconsin law applies. Accordingly, the Court of Appeals, using the Wisconsin standard, has a duty to review the evidence. If it concluded that there was no evidentiary basis to the jury's finding, it was obliged to set the verdict aside. That is precisely what the Court of Appeals did. It held that the undisputed facts required a finding that the manufacturer was altogether free of negligence. In doing so, it was merely applying the appropriate

standard of review. As the Wisconsin Supreme Court recently said in *Schuh v. Fox River Tractor Co.*, 63 Wis.2d 728, 744, 218 N.W.2d 279 (1974):

> "Generally, the apportionment of negligence is for the jury and will not be upset except where it is manifest as a matter of law that the allocation is unreasonably disproportionate. Where, however, it appears that the negligence of the plaintiff is as a matter of law equal to or greater than that of the defendant, it is not only within the power of the court but it is the duty of the court to so hold."

III. The Court of Appeals Correctly Followed Wisconsin Law in Holding That There Was No Evidentiary Basis to Support the Jury's Finding.

The petition asserts the fallacious proposition that, under the comparative negligence doctrine in Wisconsin, an appellate court must affirm a verdict in the absence of prejudicial error in the admission of evidence or in the charge to the jury. That is not the law of Wisconsin. Under Wisconsin law, appellate courts have a duty as a *matter of law* to dismiss an action where there has been a failure to meet the legal standard for liability.[2] The Wisconsin Supreme Court has recently reaffirmed the appellate court's duty to dismiss the case where a product cannot be found to be unreasonably dangerous because the alleged defect is open, obvious, and known to the plaintiff. *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis.2d 326, 230 N.W.2d 794 (1975). In accord, *Yaun v. Allis Chalmers*, 253

[2] *Hollie v. Gilbertson*, 38 Wis.2d 245, 250, 156 N.W.2d 462 (1968); *Ernst v. Greenwald*, 35 Wis.2d 763, 773, 151 N.W.2d 706 (1967); *Lautenschlager v. Hamburg*, 41 Wis.2d 623, 627, 165 N.W.2d 129 (1969); *Brown v. Haertel*, 210 Wis. 345, 244 N.W. 630 (1932); *Cameron v. Union Automobile Ins.* Co., 210 Wis. 659, 246 N.W. 420, 247 N.W. 473 (1933); *Zenner v. Chicago, St. P., M. & O. R. Co.*, 219 Wis. 124, 262 N.W. 581 (1935); *Gauthier v. Carbonneau*, 226 Wis. 527, 277 N.W. 135 (1938).

Wis. 558, 34 N.W.2d 853 (1948). *Schuh, supra*, reaffirms the duty to dismiss where the particular training, status, knowledge and experience of the user requires a determination by the court that the user's negligence exceeds that of the manufacturer as a matter of law. These recent decisions are strikingly similar to the instant case.[3]

In *Schuh*, the plaintiff sought damages for the loss of a leg after it was caught in the fan of a piece of farm machinery known as a crop blower. The jury attributed 60 percent of the causal negligence to the defendant and 40 percent to the plaintiff. On motions after verdict, the trial court set the jury's verdict aside, directed a verdict in favor of the defendant, and dismissed the complaint. The Wisconsin Supreme Court affirmed, giving the same consideration and importance to the status and training of the farmer as the majority in the Court of Appeals gave to the master plumber in the case at bar. The Wisconsin Supreme Court relied upon these facts:

> "The plaintiff was a farmer and had lived on a farm practically all his life. He was familiar with farm machinery. He had worked with this same machine two- and one-half days the previous year, and a full day on the day of the incident. He knew that the crop blower was equipped with a fan capable of propelling silage through a nine-inch pipe at least far enough to reach the top of a silo. It was essential that the fan continue to operate after the auger stopped in order to clear the pipes, and no machine was manufactured by any manufacturer, in which the clutch stopped both the fan and the auger.
>
> "On at least two previous occasions on the day in question, the conveyor belt had come off the sprocket and on each occasion plaintiff disengaged the clutch lever. . . ." 63 Wis.2d at 744.

[3] None of these three cases are cited by petitioners.

The Wisconsin Supreme Court concluded, that because of his familiarity and experience with the crop blower, the farmer's negligence exceeded that of the manufacturer as a matter of law. *Id.* at 744-745.

The foregoing analysis is substantially the same as that applied by the Court of Appeals in this case. (See A-13). In concluding that the Ridgid 300 was reasonably safe for its intended use and that the negligence of the appellee was the sole cause of the accident, the Court considered the facts of this case, including the status, intelligence, and training of the user, just as the Wisconsin Supreme Court did in *Schuh*.

It is unimportant whether the reviewing authority fashions its holding on a reapportionment of the causal negligence as a matter of law, as was done in *Schuh*, or whether it dismisses the action because the alleged defect is open and obvious to a knowledgeable user and, therefore, as a matter of law the product cannot be unreasonably dangerous as in *Vincer*. The same result follows: no liability.

Vincer is the most recent expression of the Wisconsin Supreme Court concerning the effect of an open and obvious danger on the liability of a manufacturer. The court sustained a demurrer to a complaint which alleged negligence and strict liability for the defendant's failure to equip a swimming pool with a self-closing gate. The court stated:

> ". . . [T]he test in Wisconsin of whether a product contains an unreasonably dangerous defect depends upon the reasonable expectations of the ordinary consumer concerning the characteristics of this type of product. If the average consumer would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury, it would not be unreasonably dangerous and defective. This is an objective test and is not dependent upon the knowledge of the particular injured consumer,

although his knowledge may be evidence of contributory negligence under the circumstances. In *Schuh v. Fox River Tractor Co.* for example, the court held that the positioning of the clutch lever on a crop blower machine constituted an unreasonably dangerous defect because a potential user might be misled as to its function. However, the court held the particular injured plaintiff's contributory negligence greater than any negligence of the manufacturer because the plaintiff was an experienced operator of the machine and knew of the potential dangers, yet failed to exercise due care.

"Based upon the principles discussed above, we conclude that the swimming pool described in plaintiffs' complaint does not contain an unreasonably dangerous defect. The lack of a self-latching gate certainly falls within the category of an obvious rather than a latent condition. Equally important, the average consumer would be completely aware of the risk of harm to small children due to this condition, when the retractable ladder is left in a down position and the children are left unsupervised. We conclude, therefore, that plaintiffs' second amended complaint fails to state a cause of action." 69 Wis.2d at 332-333.

The Court of Appeals reached the same conclusion for substantially the same reasons. It said:

> ". . . we are of the opinion that the question of whether a danger is open and obvious to a user of a particular instrumentality is not a matter which should be determined in a vacuum. Rather, the unique facts of each case should bear on the question, and thus, in our opinion, includes the status, intelligence, and more importantly, the training of the particular user involved.
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> * * * * * * *
>
> "Accordingly, since we find that the Rigid 300 was reasonably safe for its intended use, taking into account

the training and experience of the persons for whose use the machine was intended, and that appellee's negligence was the sole cause of the injuries sustained, we find error in the verdict in the court below." App. A-12-A-14.

It is interesting to note that dissenting Wisconsin Justices Wilkie and Heffernan had the same problem with the majority decision in *Vincer* that dissenting Judge Campbell had with the majority decision in the instant case. In noting his dissent in *Vincer*, Chief Justice Wilkie stated:

"The first problem I find in the majority opinion is that it holds that there was no defect here as a matter of law. I would hold that this was a factual determination to be tried out by the trier of fact. There is a question here for the trier to determine whether the swimming pool (which did not have a self-latching and closing gate) was unavoidably unsafe as, for example, knives, baseball bats, alcohol, small foreign cars, and, therefore, not defective. Then, too, it would be a question of fact whether rendering the product safe by incorporating other safety features would destroy the usefulness of the product, or would be far too costly. On this the defective swimming pool manufacturer would have the burden of proof.

"The additional *holding of the majority ruling out liability where the defect is obvious and apparent*—as here—is really based upon the concept of assumption of risk which *Dippel, supra,* held was not an absolute bar to recovery but rather a matter of contributory negligence . . .

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"Thus, I would conclude that the obviousness of a defect is not a total bar to recovery, but merely a matter pertaining to contributory negligence." 69 Wis.2d at 333-336. [Emphasis supplied.]

This is the substance of the argument made by the petitioners. This argument was rejected by the majority of the Wisconsin Supreme Court in *Vincer*. The Wisconsin law was not misunderstood, but accurately applied by the majority in the instant case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted

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